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In the Supreme Court of the United States

OCTOBER TERM, 1995

LAMBERT C. MIMS,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the proponent of hearsay evidence can raise the federal residual hearsay rule for the first time on appeal, thus dispensing with the statutory requirements of Rule 803(24) of the Federal Rules of Evidence.

II. Under the Hobbs Act:

A. Whether a "quid pro quo" is a requirement of extortion "under color of official right" in cases that do not involve campaign contributions.

B. Whether a public official has committed extortion "under color of official right" when he has not personally obtained any property as a result of the alleged extortion scheme.

III. Pursuant to Rule 6(e)(4) of the Federal Rules of Criminal Procedure:

A. Whether the government must explain to the magistrate the reasons for its request when it seeks sealing of an indictment.

B. Whether it is legitimate to seal an indictment for the purposes of tolling the statute of limitations in order to continue an investigation against other defendants on unrelated charges.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit on remand is unpublished, and is set forth in the appendix at App-1. The prior, unpublished, opinion of the United States Court of Appeals for the Eleventh Circuit is set forth in the appendix at App-25. The judgment of this Court granting a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is set forth in the appendix at App-29.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 26, 1996. (App-1) This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Rule 803(24) of the Federal Rules of Evidence provides that:

> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will

best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section...

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Rule 6(e)(4) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

For twenty years, from 1965 to 1985, petitioner Lambert C. Mims served as a member of the City Commission of the City of Mobile, Alabama, and as the Public Works Commissioner. Pursuant to a local rotation system in effect at the time, while a Commissioner, Mims also served periodically as Mayor of Mobile. In 1988, after a brief stint in the private sector, Mims decided to run for mayor. The election was to take place in July of 1989.

On December 1, 1988, an indictment was returned in the United States District Court for the Southern District of Alabama that charged Mims, along with co-defendants Charles Shaw and Ellis McDonald, with three counts of violating the Hobbs Act. At the request of the Assistant United States Attorney, unaccompanied by any explanation, the Magistrate directed that that indictment be sealed.

Meanwhile, unaware that an indictment had been secretly filed, Mims continued to

campaign for office. Seven months later, on June 30, 1989, the same grand jury returned a thirty-five count superseding indictment.

The superseding indictment, filed just weeks before the upcoming election, included the identical three Hobbs Act counts as to Mims that were the basis of the earlier indictment. Count Two charged that McDonald, Shaw and Mims conspired to violate the Hobbs Act, 18 U.S.C. §1951, by obtaining for Shaw a percentage of ownership in Area Services, Inc. ("ASI"), a company Gerald Godwin had formed in connection with a proposal he had submitted to the City of Mobile to build and operate a steam plant, and by attempting to obtain from National Heritage Mortgage Corporation the right to make the decision as to what company would build the proposed steam plant. Counts Three and Four alleged substantive Hobbs Act violations that mirrored those alleged extortion schemes. By the time the superseding indictment was filed, Count Three was no longer timely under the relevant statute of limitations.

The new indictment also included some thirty additional counts against McDonald, F. Lee Jackson, Jr., Francis A. Wilkie, Jr., and others, charging unrelated tax and mail frauds, and a RICO count against McDonald, Jackson, and Mims, which incorporated as racketeering acts many of the thirty-odd counts against McDonald and Jackson, as well as two of the Hobbs Act counts against Mims. RICO forfeiture was sought only against McDonald.

The trial began in January, 1990. The alleged extortion victim, Gerald Godwin[1], provided the crucial evidence against Mims -- both in the form of live testimony and through the admission of self-serving notes Godwin prepared after he developed a motive to fabricate.

Godwin testified that he submitted a proposal to the City of Mobile to build and operate a steam plant and that, to obtain the contract, he was required to turn over an interest in his company, ASI, a shell corporation, to defendant Charles Shaw, a local businessman and longtime friend of Mims's. Shaw had submitted a competing proposal to the City, which had been picked by an independent engineering firm, but Godwin maintained that Shaw's proposal was unfeasible.

According to Godwin, the alleged extortion took place on December 8, 1983. Godwin testified that co-defendant McDonald introduced him to Shaw, and allegedly told both men that if a steam plant was going to be built, he (McDonald) was going to build it. McDonald then told the two men to work out the arrangements. Godwin further testified that he then went to Shaw's office where Shaw insisted that Godwin transfer to him 50% of ASI.

Mims was not present at either of these December 8th meetings, there was no

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[1] Count Two of the indictment alleged a two prong conspiracy. The second prong, like Count Four, involved National Heritage Mortgage Corporation. Since Mims was acquitted of Count Four, the jury plainly convicted on Count Two solely on the basis of the alleged Godwin extortion.

evidence that he was aware of them, and, as Godwin readily admitted, his name was not even discussed.

According to Godwin, after he had transferred an interest in ASI to Shaw, on February 2, 1984, he, Shaw and Mims met for lunch.[2] Godwin testified that Mims asked both him and Shaw if they had their "business was worked out" and both men said that it was. Mims then allegedly told Shaw to send a letter advising the City that the contract should go to ASI.

On March 2, 1984, the City gave Godwin a letter of intent. Ultimately, however, the City of Mobile never awarded a contract to any company because oil prices dropped and the proposal for a steam plant was no longer economically desirable.

On April 3, 1990, the jury returned its verdict. The jury acquitted Mims of

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[2] Godwin testified that the meeting took place on February 2d. His diaries, introduced by the government over objection that they were self-serving hearsay (see Point I, supra), also indicated that the meeting took place on that date. The government, over objection, was permitted to introduce Mims's appointment books that showed that he did not attend a meeting on February 2, but was at a lunch meeting with Shaw on January 30th. Although Godwin continued to maintain, even on rebuttal, that the meeting was on February 2, the government argued to the jury that it was on January 30, which, the government said, was significant because the City had given AER until February 1st to finalize its proposal. Mims denied attending a meeting with Godwin on either date.

Count One, the RICO count, and of Count Four, involving National Heritage Mortgage Corporation, but convicted Mims of Counts Two and Three, the two counts that dealt with the alleged extortion of Godwin.

On June 8, 1990, Mims was sentenced to two ten year terms of imprisonment, to be served concurrently, and was fined $10,000.00.

Mims appealed his conviction to the Court of Appeals for the Eleventh Circuit. On December 15, 1993, the Court summarily affirmed.

On February 4, 1994, the Eleventh Circuit decided United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), which held that a quid pro quo is a requirement in all Hobbs Act cases involving extortion "under color of official right." The parties promptly alerted the Court to the importance of Martinez, but, on February 11, 1994, the Court denied Mims's petition for rehearing and suggestion for rehearing en banc.

Mims filed a timely petition for a writ of certiorari to this Court. Among other questions, Mims sought review of the Hobbs Act issues he had raised in his petition for rehearing, of the improper sealing of the indictment, and of the propriety of the admission into evidence of detailed notes that Godwin prepared after he developed a motive to fabricate.

On January 10, 1995, this Court decided United States v. Tome, 115 S. Ct. 696 (1995), holding that prior consistent statements are only admissible pursuant to Rule 801(d)(1)(B) when they are made before the declarant has a motive to fabricate.

Since Godwin's notes were admitted under an erroneous interpretation of the Rule, on January 17, 1995, this Court granted Mims's petition, vacated the judgment, and remanded the case to the Eleventh Circuit for reconsideration in light of Tome. This Court did not address any of the other questions raised by Mims in his petition or in any way indicate that certiorari had been denied as to those questions. (App-29)

On remand, Mims argued the Tome issue. In addition, Mims argued that, because the judgment had been vacated, the case was still on direct appeal. Mims asked the Eleventh Circuit to reverse Mims's conviction since the jury had not been instructed that a quid pro quo was a required element of the Hobbs Act offense. On February 26, 1996, the Eleventh Circuit, addressing only the evidence question, once again affirmed the conviction. (App-1)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHETHER THE STATUTORY REQUIREMENTS OF THE RESIDUAL HEARSAY RULE MUST BE FOLLOWED

During the government's rebuttal case, the government was permitted, over objection, to admit into evidence documents that were referred to as Godwin's "diaries." Although Godwin had admitted that he prepared the "diaries" after he decided that he would not go through with the deal with Shaw and in anticipation of litigation, under the Eleventh Circuit's minority interpretation of Rule 801(d)(1)(B), the "diaries" were admitted as prior consistent statements admissible

to rebut a charge of recent fabrication.

On January 17, 1995, this Court granted Mims's petition for a writ of certiorari and remanded to the Eleventh Circuit for reconsideration of this ruling in light of United States v. Tome, 115 S. Ct. 696 (1995). On remand, the Eleventh Circuit upheld the admission of the so-called "diaries" on an entirely different theory, and one not raised by the government until the remand.

Since Godwin's notes could not be justified under any existing hearsay exception, the government, for the first time after the remand, raised the residual hearsay rule. The government had not relied on Rule 803(24)[3] before trial. Consequently, the government did not comply with the Rule's pretrial notice provisions. Nor did the district court make the crucial findings of fact required by the Rule. The Eleventh Circuit, acknowledging that the statutory requirements of the Rule had not been met, nevertheless held that the notes were admissible under the residual hearsay rule. (App-20-24)

A number of Circuits have squarely held that the statutory requirements of Rule 803(24) must be strictly enforced and that, because of those requirements, an appellate court cannot consider the residual hearsay rule when raised for the first time on appeal. United States v. Pelullo, 964 F.2d 193, 202-03 (3d Cir. 1992); United States v. Tafollo-Cardenas, 897 F.2d 976, 980 (9th Cir. 1990); United States v. Guevara, 598 F.2d 1094, 1099 (7th

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[3] The text of Rule 803(24) is set out at page 1 above.

Cir. 1979); United State v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978).

This case stands in direct conflict with those decisions. In the Eleventh Circuit it is now permissible for a party to rely on the residual hearsay rule for the first time on appeal, even though the party did not give his adversary notice prior to trial of his intention to rely on the Rule, and despite the absence of any findings by the district court. In effect, the Eleventh Circuit has written the statutory requirements out of the Rule.

This Court has often granted certiorari to reconcile a conflict in the Circuits concerning an interpretation of one of the Federal Rules of Evidence. See, e.g., United States v. Williamson, 114 S.Ct. 2431 (1994); United States v. Tome, 115 S.Ct. 696 (1995). The Court should grant certiorari here to correct the Eleventh Circuit's erroneous reading of Rule 803(24).

If the Court grants certiorari to resolve the evidentiary issue posed in this case, then, we submit, the Court will disagree with the Eleventh Circuit's conclusion that allowing Godwin's "diaries" into evidence was "harmless error." The notes were virtually a transcript of Godwin's testimony that the jury was free to read and reread during its deliberations. Even when a document is read to the jury as "recorded recollection" pursuant to Rule 803(5), the Rule provides that it "may not be received as an exhibit." This is "in order to prevent the trier of fact from being overly impressed by the writing." United States v. Judon, 567 F.2d 1289, 1293 (9th Cir. 1978). See also United States v. Ray, 768 F.2d 991,

994 (8th Cir. 1985); United States v. Marcantoni, 590 F.2d 1324, 1330 n.6 (5th Cir.); cert. denied, 441 U.S. 937 (1937).

Moreover, it was the physical layout of Godwin's notes that formed the basis for the government's argument that the crucial meeting among Godwin, Shaw and Mims took place, not on February 2, as Godwin testified, but on January 31. Thus, the "exhibit" itself had a significance beyond merely repeating Godwin's testimony.[4]

The Eleventh Circuit ignored extensive case law making it clear that it is never harmless error to admit into evidence a written account of the government's case against the defendant. See, e.g., United States v. Brown, 451 F.2d 1231, 1234 (5th Cir. 1971); United States v. Ray, 768 F.2d 991 (8th Cir. 1985); United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988).

Permitting the jury to bring into the jury room extensive self-serving notes prepared by the government's key witness clearly had a devastating impact on Mims's "substantial rights." By admitting Godwin's "diaries" into evidence, Godwin, in effect, "accompanied the jury into the jury room." Brown, 451 F.2d at 1234. That, we submit, cannot be deemed mere "harmless error."

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[4] In addition, the notes were highly inflammatory. On the page that includes the critical date of December 8, 1983, written lengthwise, two words are prominently displayed in the margin: Hobbs Act.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHAT CONDUCT BY A PUBLIC OFFICIAL CONSTITUTES EXTORTION "UNDER COLOR OF OFFICIAL RIGHT"

Mims was convicted of violating the Hobbs Act,[5] and sentenced to ten years in prison, even though the jury was never told that to convict him of extortion "under color of official right" it had to find a "quid pro quo," and even though he "obtained" no "property" from the alleged extortion scheme. In essence, Mims was convicted of extortion because, according to the government's theory of the case, he used his office to steer a potential government contract to a friend.

This case takes the Hobbs Act where it has never gone before. The government was not required to, and did not prove, that Mims received any "property" directly or indirectly from the purported extortion victim or from his friend. Thus, the federal crime of extortion has now been defined, at least in the Eleventh Circuit, to include the use of a public office to benefit a friend at the expense of a third party. This crime is committed even when the public official has not been "paid off," even if the official's motive was to advance the public good, and even if the public may have benefitted by his actions.

While this case is extreme, the proper reach of the "official right" prong of the Hobbs Act has plagued the federal courts since the early 1970s, when the government first began aggressively using the Hobbs

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[5] The text of the relevant portions of the Hobbs Act, 18 U.S.C. § 1951, is set out at page 2 above.

Act to attack public corruption at the state and local levels. See generally Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L.J. 1171 (1977). This Court's intervention is needed to make clear when a federal prosecution of state officials is warranted under the Hobbs Act.

A. Review Is Necessary To Resolve Whether A "Quid Pro Quo" Is Always A Requirement Of The "Under Color of Official Right" Prong Of The Hobbs Act

In McCormick v. United States, 500 U.S. 257 (1991), this Court held that a public official does not commit extortion "under color of official right" when he accepts a campaign contribution unless the government proves an explicit "quid pro quo." Receiving contributions is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Id. at 273.

The following year, in Evans v. United States, 504 U.S. 255 (1992), the Court held that "inducement" is not an element of the crime of extortion "under color of official right." Rather, to establish the crime, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268.

McCormick expressly left open whether a "quid pro quo" is an essential element of the crime outside of the campaign contribution context question. 500 U.S. at 274, n.10. Although language in Evans suggested that a quid pro quo was required

in all "official right" Hobbs Act cases, the issue was neither presented nor decided.

In this case, the jury was charged very generally on both the "official right" and "fear of economic harm" theories of extortion.[6] The jury, however, was not instructed that to find Mims guilty under the "official right" theory of extortion it had to find a quid pro quo.[7] Thus, Mims

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[6] When a jury is charged on two theories, if one of the theories is legally deficient, the conviction must be reversed. Griffin v. United States, 112 S.Ct. 466, 470 (1991). See also United States v. Martinez, 14 F.3d 543, 553 (11th Cir. 1994) (applying this rule to reverse a Hobbs Act conviction where jury charged incorrectly on "under color of official right" theory, but properly on "fear of economic harm" theory); United States v. Garcia, 992 F.2d 409, 416 (2d Cir. 1993) (same); United States v. Collins, 1996 WL 101420 (6th Cir. 1996) (same). Thus, if Mims conviction is legally invalid under the "official right" theory of extortion, it must be reversed.

[7] The instructions on the "official right" prong of extortion were remarkably brief:

> Extortion also includes the wrongful acquisition of property from someone else under color of official right.
>
> * * *
>
> Extortion under color of official right is the wrongful taking by a public officer of money or

might well have been convicted for the "wrongful use" of his "official power," even though the jury did not find that he or Shaw obtained any property in return for "an explicit promise or undertaking ... to perform or not to perform an official act." McCormick, 500 U.S. at 273.

Whether a quid pro quo is required for all "official right" Hobbs Act violations is a question that this Court must ultimately resolve. The federal courts are now grappling with this question, with mixed results.

The Second and Fourth Circuits have extended McCormick outside of the campaign contribution context. See United States v. Taylor, 993 F.2d 382 (4th Cir.), cert. denied, 114 S.Ct. 249 (1993); United States v. Garcia, 992 F.2d 409 (2d Cir. 1993). The law in the Sixth and Eleventh Circuits is far less clear. The Sixth Circuit indicated in United States v. Blandford, 33

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property not due him or his office whether or not the taking was accomplished by force, threats, or use of fear. The wrongful use of otherwise valid official power may convert a lawful action into unlawful extortion. So, if a public official misuses his office by threatening to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion even though the official was already duty bound to take or withhold the action in question. (Tr. 10395-96)

F.3d 685 (6th Cir. 1994), cert. denied, 115 S. Ct. 1821 (1995) that a quid pro quo was not required except in campaign contribution cases. However, more recently, in United States v. Collins, 1996 WL 101420 (6th Cir. 1996), a panel of the Court appeared to hold that a quid pro quo is required in all "official right" Hobbs Act prosecutions. But then, despite this purported holding, the Court went on to hold that the jury need not be instructed that it must find a quid pro quo for payments that are not campaign contributions, thus suggesting that the quid pro quo requirement is not an essential element of the crime.

The confusion in the law is perhaps best exemplified in the Eleventh Circuit. In United States v. Martinez, 14 F.3d 543 (11th Cir. 1994), the Court held that a quid pro quo is a requirement in all "official right" Hobbs Act prosecutions. And, in United States v. Davis, 30 F.3d 108 (11th Cir. 1994), involving non-campaign payments, the Court granted a petition for rehearing to reverse a conviction where the jury was not instructed on the quid pro quo requirement. Yet, in this case, the panel of the Eleventh Circuit simply ignored the "quid pro quo" requirement, both on the petition for rehearing, and after remand, when Mims explicitly asked the Court to reconsider whether it was appropriate to affirm a conviction that was no longer valid under existing law.

Undoubtedly, the government will continue to prosecute public officials under the Hobbs Act in cases that do not involve campaign contributions. Undoubtedly, there will continue to be inconsistent rulings on what the jury must find in order to convict a defendant of

extortion "under color of official right." This Court should grant review in this case to finally decide whether the government must prove a quid pro quo in all "official right" Hobbs Act cases.

B. Review Is Necessary To Decide Whether A Public Official Commits Extortion "Under Color Of Official Right" When He Does Not Obtain Property From Another

There is one indisputable fact in this case. Commissioner Mims obtained no property from either Godwin or Shaw as a result of the alleged extortion scheme. Godwin, the alleged victim, transferred an interest in his company to Shaw, but he did not give anything to Mims to obtain his approval for the steam plant contract. Nor did Shaw, the alleged beneficiary of the extortion scheme, pay Mims to obtain his cooperation.

This case, therefore, raises an extraordinarily important question concerning the scope of the Hobbs Act: has a public official committed extortion "under color of official right" when he has neither obtained property from the alleged extortion victim nor otherwise benefitted from the alleged extortion scheme.

Surely, he has not. The statute itself reads that the official must "obtain[] ... property of another ... under color of official right." 18 U.S.C. §1951(b). In McCormick, this Court defined "official right" extortion as "the receipt of money by an elected official under color of official right" in return for "an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273 (emphasis

added). And in Evans, the Court repeatedly stressed that it is the unauthorized taking by the public official of money or property that is the gist of the crime. As the Court put it: "the statute merely requires of the public official that he obtain 'property from another, with his consent ... under color of official right.'" 504 U.S. at 265 (emphasis added).

Reading the Hobbs Act, as the lower courts did here, to cover any use of public office to bestow a benefit on a third party to the detriment of another,[8] even absent any payment or other benefit to the public official, creates a Hobbs Act of virtually boundless reach. Under this extraordinarily expansive view of the Hobbs Act, motive is of no moment. The public official may be acting for legitimate public purposes, yet he has still committed a federal crime.

Whenever, for example, an official recommends that a particular contractor participate in a government contract because he has proven reliable in the past, if that contract could have been awarded to another bidder, the official has committed extortion since he has used his office to

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[8] "Property" under the Hobbs Act is broadly construed to include any "valuable right," including the right to solicit or obtain business. See, e.g., United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981). Thus, virtually any official action causing a person to suffer a detriment can be considered the obtaining of "property" from that person.

benefit one person to the detriment of another. Likewise, whenever a public official steers a government contract to a minority contractor to the detriment of another, he has violated the Hobbs Act, even if the official genuinely believes that his efforts to promote minority businesses are consistent with his public duty. This type of federal intrusion into local decision-making cannot be what Congress intended.

This Hobbs Act prosecution of Mims even though he was not "paid" in return for a promise to take official action may be unprecedented.[9] But if this decision is allowed to stand, the federal government will view it as a green light for prosecuting other state and local officials for conduct that has never before been considered extortionate and has never before been subject to federal control.

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[9] Defendants have been convicted of violating the "fear" or "threat of force" prong of the Hobbs Act when the benefit that has been extorted has been paid to a third party. See, e.g., United States v. Green, 350 U.S. 415 (1956) (involving threats by union officials in order to secure jobs for union workers). In these cases, unlike here, the extortion is neither passive nor equivocal. There are also a smattering of "official right" Hobbs Act convictions when the official has indirectly benefitted from the extortion, for example, by payments being made into the coffers of his political party. See, e.g., United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980) (requiring payment to be made to defendant's party's political committee).

This Court should grant review to determine whether the "under color of official right" language of the Hobbs Act can be stretched to cover the type of official conduct at issue in this case.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE GOVERNMENT MUST JUSTIFY ITS REQUEST WHEN IT SEEKS SEALING OF AN INDICTMENT AND WHETHER IT IS LEGITIMATE TO SEAL AN INDICTMENT FOR THE PURPOSE OF TOLLING THE STATUTE OF LIMITATIONS

This case squarely poses two important questions concerning the sealing of indictments pursuant to Rule 6(e)(4) of the Federal Rules of Criminal Procedure:[10] (1) must the government provide a reason when it asks a magistrate to seal an indictment; and (2) is it legitimate to seal an indictment for the purpose of tolling the statute of limitations to continue an investigation of another defendant on unrelated matters.

Although this Court has never addressed these issues, the lower courts have given the government virtual carte blanche to seal an indictment -- without articulating a reason to the magistrate, and even if the reason, as here, is to toll the statute of limitations.[11] We submit

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[10] The text of Rule 6(e)(4) is set out at page 3 above.

[11] See, e.g., United States v. Sharpe, 995 F.2d 49 (5th Cir.), cert. denied, 114 S.Ct. 234 (1993); United States v. Richard, 943 F.2d 115 (1st Cir. 1991); United States v. Larkin, 875 F.2d 168 (8th Cir. 1989); United States v. Srulowitz, 819 F.2d 37 (2d

that the courts have been uniformly wrong -- that they have misread and misapplied Rule 6(e)(4). More importantly, in doing so, the courts have transferred a power Congress specifically gave to the judiciary to the executive branch and have given the executive branch unbridled power to dispense with the legislatively ensured protections of the statute of limitations.

This case provides a glaring example of the impropriety of the current practice, of the unfair impact it has on a defendant's rights, and of the pressing need for this Court's intervention.[12]

The government began investigating the alleged extortion in connection with the steam plant proposal back in 1984. By early 1986, a grand jury had been convened and the government had the evidence it would later introduce against Mims. But the government did not indict Mims. The government, instead, began an unrelated investigation of Ellis McDonald.

Cir.), cert. denied, 484 U.S. 853 (1987); United States v. Ramey, 791 F.2d 317 (4th Cir. 1986); United States v. Edwards, 777 F.2d 644 (11th Cir. 1985), cert. denied, 475 U.S. 1123 (1986).

[12] This Court can and has stepped in to rectify even a unanimous misreading of a federal statute. See, e.g., McNally v. United States, 483 U.S. 350 (1987) (rejecting uniform misreading of mail fraud statute by lower courts); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (rejecting unanimous conclusion that Title VII prohibited discrimination on the basis of pregnancy).

After a delay of three years, on December 1, 1988, just the day before the statute of limitations was to expire on one of the counts, the government filed a relatively simple three count indictment against Mims and two co-defendants, Charles Shaw and Ellis McDonald, charging them with three counts of violating the Hobbs Act, all involving the steam plant proposal. The government, without providing any reason for the request, asked the Magistrate to seal the indictment. The Magistrate granted the request and the indictment was sealed.

The government then continued its massive investigation of McDonald and other individuals. On June 30, 1989, seven months later, upon the conclusion of that investigation -- an investigation even the government has acknowledged had nothing to do with Mims -- a superseding indictment was filed.

This new indictment added some thirty counts involving McDonald and others. Those thirty counts did not mention Mims and were unrelated to the Hobbs Act violations alleged in the original indictment. The government also added one RICO count containing as predicate acts, or subsets of predicate acts, virtually all of the thirty counts against McDonald and others. The RICO count named Mims, but charged him only with two predicate acts identical to the Hobbs Act violations contained in the first indictment.

By the time the superseding indictment was filed, the statute of limitations had run on Count Three of the indictment that charged Mims with extorting Godwin -- the only substantive Hobbs Act violation of

which he was ultimately convicted.[13] In addition, in the intervening months, a critical witness whom Mims expected would provide exculpatory testimony became unavailable to testify at trial. The witness's inculpatory out-of-court hearsay statements, including his grand jury testimony which had not been subjected to cross-examination, were nonetheless admitted at trial.

Mims moved to dismiss the superseding indictment on the ground of prejudicial preindictment delay and on the further ground that certain of the charges were barred by the statute of limitations. Mims argued that since the indictment had been improperly sealed, the statute was not tolled. The motion to dismiss was denied, and the Eleventh Circuit summarily affirmed.

A. Review Is Necessary To Determine Whether The Government Must Articulate To The Magistrate The Reason Why It Seeks Sealing Of The Indictment

Rule 6(e) provides that the magistrate "may" (not shall) order the indictment to be sealed. This means that the magistrate has discretion to either grant or deny the government's request. Yet, a number of courts have held that the government need not tell the magistrate why it wants the indictment to be sealed. The magistrate is to exercise his or her discretion with

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[13] Mims was also convicted of Count Two, which, as already noted, alleged a two-pronged Hobbs Act conspiracy. That count was technically timely, but only because of the allegations relating to National Heritage Mortgage Corp.

literally no information on which to base a decision. And, remarkably, even this uninformed exercise of discretion is to be afforded "great deference." See, e.g., Srulowitz, 819 F.2d at 41; Sharpe, 995 F.2d at 52. But see United States v. Maroun, 699 F.Supp. 5, 6 (D. Mass. 1988) (recognizing that a request to seal an indictment cannot be "addressed to the sound discretion of the magistrate if she is not informed as to the reason for the request or the facts in support of it").

Congress gave the magistrate -- and not the prosecutor -- the discretion to direct the sealing of an indictment. But a magistrate can only exercise discretion if he or she is provided with facts sufficient to enable an informed decision to be made. Otherwise, the magistrate is nothing more than a rubber stamp for the executive. Put another way, routinely granting a prosecutor's request to seal an indictment without regard to the reason for the request or the underlying facts is not an exercise of discretion. It is ministerial act to which no deference should be paid.[14]

According to the lower courts, there is no need for the prosecutor to explain to the magistrate why sealing is requested

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[14] Indeed, in Srulowitz, the Court, in one breath, referred to the sealing as "but a ministerial act," yet, in the next breath, concluded that the magistrate's decision to seal should "of course" be accorded "great deference." 819 F.2d at 41. As one court has noted, this reasoning makes no sense since a "ministerial act is by definition, one in which the officer [has] no discretion." United States v. Laliberte, 131 F.R.D. 20 (D. Mass. 1990).

because the defendant is permitted to challenge the sealing once an unsealed indictment is filed. But once the sealing has been ordered, the defendant is in the unenviable position of asking the court to dismiss charges against him, with prejudice, on the ground that they are time-barred. Worse still, at this stage, the defendant must overcome a decision, however uninformed, by a judicial officer to whom "great deference" is owed. Rarely, if ever, will that exercise of "discretion" be disturbed.[15]

A sophisticated prosecutor will not offer any reason why a request is being made to seal the indictment if no explanation is necessary. Yet requiring the prosecutor to explain the reasons for its request is the only way the magistrate can exercise discretion about whether the request should be granted. The current and accepted practice has in effect rewritten Rule 6(e)(4) so that it is the prosecutor, and not the magistrate, who decides whether

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[15] If the magistrate denies the sealing request after the prosecutor has proffered its reasons, the prosecutor can always file the indictment, unsealed. And if the magistrate grants the request, after considering the facts and circumstances, there is a reason why that exercise of discretion should be respected. As Judge Friendly explained in United States v. Southland Corp., 760 F.2d 1366, 1380 (2d Cir.), cert. denied, 474 U.S. 825 (1985), the government "should be able, except in the most extraordinary cases, to rely on ... [the magistrate's] decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego...."

an indictment is to be sealed. This Court should grant review to rectify this clear misreading of the Rule.

B. Review Is Necessary To Determine Whether It Is Legitimate To Seal An Indictment For The Purpose of Tolling The Statute Of Limitations

Rule 6(e)(4) speaks of sealing an indictment "until the defendant is in custody or has been released pending trial." Nevertheless, the courts have held that an indictment may be sealed "where the public interest requires it," or "for sound reasons of policy." Southland, 760 F.2d at 1379, 1380. In other words, an indictment may be sealed for any "legitimate" reason. Larkin, 875 F.2d at 170-171.

In the Eleventh Circuit, it is now the law that it is "legitimate" for the prosecutor to do what was done here: to seal an indictment for the sole purpose of tolling the statute of limitations against one defendant in order to continue an investigation of other defendants on unrelated charges. In the Eleventh Circuit, it is "legitimate" to seal an indictment not to locate a defendant's whereabouts, not to prevent him from fleeing, not to protect witnesses, and not to protect against early and potentially harmful media coverage, but precisely to deprive the defendant of the protections of the statute of limitations. If that is a "legitimate" purpose, then the statute of limitations has lost all meaning.[16]

[16] At least one district court has concluded that it is not a legitimate purpose to seal an indictment in order to continue an investigation of other,

Prior to arrest, a defendant has no Sixth Amendment right to a "speedy" disposition of his case. United States v. Marion, 404 U.S. 307 (1971). Instead, "[t]he law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge." Id. at 322. Chief among those mechanisms, is the "applicable statute of limitations." Id.

Statutes of limitations are the "primary guarantee against bringing stale criminal charges," and "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." Id. See also United States v. Lovasco, 431 U.S. 783, 788 (1977); Toussie v. United States, 397 U.S. 112, 114-15 (1970).

Congress has expressly provided a statute of limitations for every federal crime. These statutes can be tolled under very limited circumstances. Under the Eleventh Circuit's rule, however, the prosecutor -- an arm of the executive branch -- can easily circumvent the statute of limitations in violation of Congress's intent. Moreover, a defendant no longer has a "mechanism" to guard against the prejudice suffered by virtue of pre-arrest, pre-indictment delay. All the prosecutor must do is ask the magistrate to seal the indictment and it will be sealed -- here, for a period of seven months. The

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unrelated charges, even when, unlike here, those new charges are against the defendant. United States v. Rogers, 781 F.Supp. 1181 (S.D. Miss. 1991).

prosecutor then can continue its investigation at its leisure -- an investigation that, as this case shows, need not even be directed against the indicted defendant. Meanwhile, as happened here, the charges become stale, witnesses become unavailable, and memories fade.

If it is "legitimate" to seal an indictment in order to toll the statute of limitations, then the statute of limitations is of little consequence. Review should be granted so that this Court can restore the statute of limitations as the defendant's "primary guarantee" against pre-arrest, pre-indictment delay.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 9, 1996
New York, New York

[Do Not Publish]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7436

D.C. Docket No. CR89-00105-B

FILED
U.S. Court of Appeals
Eleventh Circuit
Feb. 26, 1996
Miguel J. Cortez
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Alabama

(February 26, 1996)
ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

In 1990, Lambert C. Mims ("Mims"), the former Mayor of Mobile, Alabama, was convicted of two counts of Hobbs Act, 18 U.S.C. § 1951, violations and was sentenced pre-Guidelines[1] to ten years imprisonment, a $10,000 fine, and a $100 special assessment. In an unpublished per curiam opinion, this court affirmed the defendant's convictions in December of 1993. See United States v. McDonald, 12 F.3d 217 (11th Cir. 1993). On January 17, 1995, the United States Supreme Court granted certiorari, vacated this court's judgment, and remanded the case for further consideration in light of Tome v. United States, 513 U.S. ____, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). Upon remand, the parties filed supplemental briefs and we heard oral argument. We find it unnecessary to reach the issue of whether Tome applies in this case, both because the admission of the Godwin diaries was harmless error in any event, and because the diaries were admissible under Federal Rule of Evidence 803(24).

I. ISSUES

On remand, we must address the following issues:

(1) whether the Supreme Court's decision in Tome v. United States, holding that prior consistent statements are admissible only when made before the declarant developed a motive to fabricate, affects Mims's conviction;

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[1] The United States Sentencing Guidelines became effective on November 1, 1987.

(2) assuming arguendo that Tome applies in this case, whether the admission of Godwin's diaries was harmless error;

(3) whether Godwin's diaries were admissible under any other recognized exception to the hearsay rule.

II. PROCEDURAL BACKGROUND

An indictment was filed on December 1, 1988, charging Ellis McDonald ("McDonald"), Charles Shaw ("Shaw"), and Mims with Hobbs Act violations. A thirty-five count superseding indictment was returned on June 30, 1989. The jury convicted Mims of Counts Two and Three.[2] Count Two charged Mims, McDonald, and Shaw with conspiracy to violate the Hobbs Act by obtaining a percentage of ownership in Gerald Godwin's ("Godwin") company, Area Services, Inc. ("Area Services"). Count Three charged Mims with a substantive Hobbs Act violation.[3] On direct appeal, this court

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[2] The indictment also included thirty other counts that were unrelated to Mims. Convicted along with Mims were McDonald, Shaw, and Francis A. Wilkie, Jr. Prior to trial, F. Lee Jackson, Jr. and William E. Cullum entered guilty pleas.

[3] Mims was acquitted of Counts One and Four. Count One charged Mims, McDonald, and F. Lee Jackson, Jr. with a RICO violation under 18 U.S.C. § 1962(c). Count Four charged McDonald, Shaw and Mims with substantive Hobbs Act violations by attempting to force National Heritage Mortgage Corporation to select McDonald's construction company to build a proposed steam

affirmed Mims's conviction.[4] The United States Supreme Court vacated that judgment and remanded the case for further consideration in light of Tome. Following the Supreme Court's remand of this case, Mims filed a motion to reinstate his appeal bond, which the district court denied on February 8, 1995.

II. FACTUAL BACKGROUND

This multiple-defendant criminal prosecution involved charges of extortion in the development of a steam plant operation, fraud and bribery at the Mobile Water Service System, fraud at the Scott Paper Company, tax fraud, and obstruction of justice. Mims's conviction involved the steam plant operation only.

A. Extortion and the steam plant

Due to high oil prices in the late 1970's and early 1980's, interest rose in building a steam-generating plant in Mobile, Alabama, that would be fueled by burning garbage or solid waste. The success of the project depended on two components. First, there had to be a purchaser for the steam with energy usage great enough to make the purchase of steam an economical and practical business proposition. Second, the party building the plant would need commitments from both Mobile County (the "County") and the City of Mobile (the "City") to provide all of

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plant.

[4] We also affirmed the convictions of Mims's codefendants. The Supreme Court denied petitions for certiorari by the codefendants.

their solid wastes for use as fuel at the plant.

In April of 1981, Godwin, the extortion victim, purchased stock in Trash Burning Systems ("TBS"), a company formed for the express purpose of developing, building, and operating the steam plant. TBS negotiated a contract with Degussa Corporation, a subsidiary of a German chemical manufacturer, in which Degussa agreed to purchase the steam if the plant was built. Degussa had sufficient energy usage requirements to warrant purchasing the steam. Thus, in order to succeed Godwin needed to obtain commitments from the City and the County for the garbage.

Mims was the city commissioner who had jurisdiction over City solid waste collection and disposal. In October of 1980, two of Godwin's associates in TBS met with Mims in order to garner his support for the steam plant project and the commitment for the City's garbage. However, Mims refused to work with the two men, because he learned that they were spreading the rumor that Mims was "on the take." The two men were forced to allow Godwin to handle the negotiations and TBS was dissolved.

In the summer of 1983, a Stone Container Corporation ("Stone Container") representative contacted Mims to express the company's interest in locating the steam plant at their factory so Mims sent Shaw to talk with Stone Container. Shaw made representations that he himself had the proper connections and relationships with City officials to facilitate the project. Prior to the submission of the steam plan proposals to the City, Mims suggested to a steam plant equipment

salesperson that Shaw would be the appropriate person to discuss the matter, because Shaw was the person putting together the plant project. During this meeting, Shaw represented to the salesperson that he had a ten-year contract with the City for the garbage and a contract with Stone Container for the purchase of the steam.

In early October of 1983, Mims made a public announcement that the City would accept bids or proposals on waste disposal. TBS having been dissolved, Godwin formed Area Services and submitted his plan for building the steam plant with the Degussa Corporation as the steam purchaser. Mims's co-defendant Shaw[5] became a part owner in CIC, Environmental Contractors ("CIC"), which was formed to bid on operating landfills in the County and was awarded the contract with the County in September of 1983.[6] Shaw submitted two steam plant proposals to the City, one for CIC and another plan under the corporate name of Alabama Energy Recovery, Inc. ("Alabama Energy"). Both proposals involved locating

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[5] Shaw was a real estate and insurance agent who maintained close ties to Mims and Commissioner Gary Greenough and did insurance and appraisal work for the City.

[6] Shaw and the other CIC owners had a dispute over Shaw's duplicitous acquisition of more CIC stock than his partners had agreed, claiming that he needed the stock to give to Mims and County Commissioner Dan Wiley to insure receipt of City and County garbage for the steam plant.

the steam plant at Stone Container;[7] however, Alabama Energy's plan had a lower tipping fee than CIC's.

The City received seven proposals on November 18, 1983. Area Services was the low bidder, but the City's consulting engineer suggested that Alabama Energy's bid was also favorable because it proposed a more central location next to Stone Container, which would cut down on transportation costs. But, an engineer had already informed Mims that Stone Container did not have sufficient energy consumption to make the project economically feasible.[8]

The problem with Stone Container soon became apparent. Frank Brown, representing McDonald's company, Campbell Piping Contractors, Inc., Shaw, and others met with officials at Stone Container on November 30, 1983, during which they informed Stone Container that the City had unofficially selected Shaw to conduct the steam plant project, that McDonald would build the plant, and that they needed more information from Stone Container to proceed. Stone Container revealed that the steam plant would not be economically

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[7] Stone Container never entered into a contract with Shaw, but did furnish him with two letters of intent for both CIC and Alabama Energy, although Stone Container did not realize that Shaw was submitting two bids.

[8] Mims notes that there were many people who thought Stone would be a viable steam user; however, there was testimony that Mims was informed of the problems with Stone.

feasible, because the company would pay more for the steam than it currently paid for energy. At this point, Godwin's contract with Degussa became quite attractive.

The crucial moment of the extortion was a December 8, 1983, meeting held at McDonald's office. During that meeting, Godwin was introduced to Shaw. McDonald then informed both Godwin and Shaw that if a steam plant was to be built, he would build it, and Godwin and Shaw could own it. He left it to Godwin and Shaw to work out the details. Godwin and Shaw then left McDonald and met at Shaw's office, where Shaw informed Godwin that if a steam plant was to be built, he would own half of it, saying "half of something is better than all of nothing." R11 at 432-33. Godwin did not agree to give Shaw an interest in his company at this time, but agreed to work something out later.

At this point, Godwin decided to attempt to persuade city officials that Alabama Energy's proposal was not viable. The City granted Alabama Energy an extension to work out a contract with Stone Container, but Shaw never made attempts to further negotiate with Stone Container after the December 8 meeting. McDonald requested that Godwin meet with him on January 7. During this meeting, in which Shaw was present, McDonald informed Godwin that his running from one person to another would have to stop. Following the meeting, Godwin and Shaw met at a restaurant where Shaw demanded to own 40 percent of Area Services for himself and 20 percent for Paul Reitzammer ("Reitzammer"), a man Shaw had brought into CIC. Godwin finally

agreed to this plan.[9] Shaw told Godwin that Alabama Energy would send a letter to the City saying that Stone Container could not purchase the steam. Shaw also formed a new company to replace CIC that involved Godwin, Shaw, and Reitzammer. The County's contract with CIC was voided by a lawsuit, and the County gave the new contract to run the landfill to Shaw's new company.

Shaw told Godwin to meet Shaw and Mims at the Bienville Club for lunch on January 30, 1984. Godwin's diary reflects that the luncheon meeting was on February 2. The government argued at trial that Godwin sometimes made entries on the wrong page in the diary. Mims's appointment book indicated that he gave a speech at the Optimist Club luncheon on February 2, but also indicated that he had a noon meeting with Shaw on January 30. City records reflected that Mims and two guests had lunch at Bienville Club on January 30. Bienville Club records showed no charges to Mims, the City, Godwin, or Shaw on February 2 but did show that the city attorney Rick Stout was at the club on January 30. Godwin recorded in his diary that it was during this lunch that he first met Stout. Godwin testified that Mims asked Shaw if Shaw had his business worked out with Godwin. Both men answered that they had worked out their differences. Mims instructed Shaw to send him a letter stating that a steam plant with Stone Container would not be feasible, and then

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[9] Shaw and Godwin met with several lawyers from January 16 to 20 to work out the details. One of the lawyers refused to continue because Shaw's insinuations that he had influence at city hall.

informed him that the City would go to work with Area Services. Shaw had a letter sent from Alabama Energy to the City on February 1 saying that the company had been unable to form the project with Stone Container. On February 27, 1984, Mims issued a press release stating that the City would work with Area Services on the steam plant project. Mims provided Godwin with a letter of intent on March 2. Ultimately, both the City and the County entered into agreements to provide garbage for the plant. Ironically, due to the drop in oil prices, the steam plant was no longer economically feasible and was never built.

B. Godwin's Diaries

Godwin testified that he regularly kept notes of various projects that he worked on through the years. He would record these notes contemporaneously or shortly after the events and would later transfer the notes into a legal pad, which he considered to be his permanent chronological diary. For the year 1984, Godwin used a desk diary to record his contemporaneous notes and then continued his routine of transferring these notes to the permanent diary. The permanent diary was marked as GEX 27A (the "permanent diary"),[10] and Godwin's miscellaneous scrap papers and the desk diary were marked GEX 27 (the "desk diary").

Godwin used the diaries to refresh his recollection and read directly from them during his direct testimony. The following

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[10] The permanent diary is a photocopy, because Godwin wanted to keep the original, but lost it during his move to Louisiana.

exchange during cross-examination reveals the extent to which the diaries were used and the contention over their admission:

> BY MR. BAXLEY [counsel for defendant McDonald]:
> Q: May it please the Court, before we start, you still have 27 in your hand that we were hollering so and objecting so about yesterday in front of you?
> A: Yes.
> MR. BAXLEY: Can we show what exhibit 27 is to the jury?
> THE COURT: Show it from here?
> MR. BAXLEY: No, I just want to pass it down.
> THE WITNESS: 27A?
> MR. BAXLEY: This is 27A?
> A: Yes.
> MR. BAXLEY: I just want to walk down and show them.
> MS. GRANADE [Assistant United States Attorney]: Judge, if he is going to exhibit it to the jury, I would like to offer it in evidence.
> MR. BURNS [counsel for defendant Shaw]: Objection.
> MR. BAXLEY: I just want to show the jury what he has been looking at.
> MS. GRANADE: I would offer it in evidence.
> THE COURT: All right. Mark it in.
> MR. BURNS: I object to it coming in.
> THE COURT: On what grounds?
> MR. BURNS: It would have to come in as a past recollection recorded which would require this witness to testify that he has no present recollection, but has to

rely upon that document in order to know what happened. Instead, the witness has said he knew what happened and he has looked at this document occasionally to refresh his recollection as to dates. So, it can only come in as past recollection recorded and there is no proper predicate.

MR. BAXLEY: Your Honor, in addition, I think it should be just shown to the jury because this witness has continually, for one day and one morning, read from it. I have asked repeatedly to see what document he is reading from. He has announced that.

THE COURT: He has done that too without objection. I think any objection in that regard is waived and I am going to order ...

MR. HAAS [counsel for defendant Mims]: Judge, may I express myself?

THE COURT: Yes, sir.

MR. HAAS: I hate to disagree with Mr. Baxley, but portions of the document would probably be admissible if the proper predicate was laid. I have seen it and a lot of it is not admissible, has not been alluded to in testimony; and I, therefore, object to the entire thing coming into evidence.

MR. BAXLEY: I am not offering it in evidence. I just want to exhibit it to the jury, to walk up, so they can see what he has been reading from.

THE COURT: Ladies and gentlemen, we have kind of a hybrid

> situation here. I am going to allow Mr. Baxley to show you this document. I am going to mark it as an exhibit for purposes of the record, but not as a government exhibit at this stage. And if the proper predicate is laid, I will consider doing it.

R12 at 636-38. Following this exchange, Baxley conducted a lengthy cross-examination that focused on discovering what happened to the original of the permanent diary and attempting to attack Godwin's credibility by casting doubt on whether he made the diary entries contemporaneously with the recorded events.[11]

Godwin testified on redirect that during his previous testimony he had been unable to recall the dates and contents of the diaries without reading directly from them. Following this testimony, the Government offered the two diaries into evidence in order to rebut defense claims that the permanent diary had been fabricated. Because Baxley suggested that the original diary entries were written after Godwin testified he had made the entries, the government requested that the jury have the diaries in order to compare them. The court reserved ruling but

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[11] The jury discovered through this questioning that the defense had asked to test the original permanent diary to determine if it had been written all at one time and again asked if the original could be produced. The district court denied these requests accepting the government's explanation of the loss.

indicated that if the defendants continued to assert that Godwin fabricated the diaries, then they would be admitted with a cautionary instruction that their admission was for a limited purpose, and the portions about which there had been no testimony would be excised.

During the government's rebuttal case, Godwin's wife testified that Godwin made the entries in the permanent diary and the desk diary in the manner in which he testified that he did. At this point, the government once again offered the diaries into evidence. All counsel objected and, after lengthy argument by all, the court concluded:

> THE COURT: ... I'm now satisfied that I can make a ruling based on all the evidence that I have discerned in this trial as to their revelancy and admissibility.
> MR. HAAS: What can I do about the fact that I have rested and I can't go in to the caustic comments and unfair comments that Godwin might have put in there about Mims?
> THE COURT: Counsel, everybody cross-examined him (Godwin) so thoroughly --
> MR. HAAS: I didn't.
> THE COURT: -- about his testimony, his recollection, about his references in the diary to one thing or another; I mean, he was exhaustively examined and cross-examined about it. So, in the Court's judgment, no prejudice is going to result to any defendant from their admission and, further, although

they may be classically either recorded recollection refreshed or just recorded recollection or prior recollection refreshed, that once Mr. Mims used them to refresh his recollection and once these documents were used in extensive cross-examination and once Mr. Godwin's credibility was attacked by defense bad character witnesses, that it becomes a jury question as to whether those diaries were as well fabricated, as well as Mr. Godwin's testimony.

Mr. Burns just stated that he was lying about this thing from the beginning, so I think it is very probative for this jury's consideration to have those diaries in conjunction with Mr. Godwin's testimony, particularly since both the diaries and Mr. Godwin were examined and cross-examined to the degree that I haven't seen in a long time.

So I'm overruling the objections to 27 and 27-A and allowing them in evidence.

R40 at 9183-84.

III. STANDARD OF REVIEW

This Court reviews *de novo* a case on remand from the Supreme Court in light of a new Supreme Court decision. United States v. M.C.C. of Florida, Inc., 967 F.2d 1559, 1561-62 (11th Cir. 1992). The Supreme Court's vacation of an opinion of this court for further consideration in light of a new Supreme Court decision does not

nullify all prior proceedings. See Id. at 1561-62. Instead, we must reconsider our decision in light of the new authority and are free to adopt any or all of our prior holding we find to be unaffected by Tome. Id. at 1562.

The erroneous admission of evidence is subject to review for harmless error. Fed. R. Crim. Proc. 52(a). In addition, "[t]he doctrine of harmless error does not require reversal of criminal convictions if the error had no substantial influence on the verdict." United States v. Martinez, 700 F.2d 1358 (11th Cir. 1983). We review rulings on the admissibility of evidence for abuse of discretion. Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 655 (11th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 69, 130 L.Ed.2d 24 (1994).

IV. DISCUSSION

The Supreme Court directed us to further consider our prior decision in United States v. McDonald, 12 F.3d 217 (11th Cir. 1993) in light of its decision in Tome v. United States, 513 U.S. ___, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995). In Tome, the Supreme Court rejected the Tenth Circuit's balancing test for admission of prior consistent statements under Federal Rule of Evidence 801(d)(1)(B) holding instead that the rule embodies the common law temporal requirement that to be admissible prior consistent statements must be made prior to the development of the motive to fabricate. Tome, 513 U.S. ___, _, 115 S.Ct. 696, 701-02, 130 L.Ed.2d 574, 582-84. The Court found: "The language of the Rule, in its concentration on rebutting charges of recent fabrication, improper influence and motive to the exclusion of other forms of impeachment, as well as in

its use of wording which follows the language of the common-law cases, suggests that it was intended to carry over the common-law pre-motive rule." Tome, 513 U.S. ____, ____, 115 S.Ct. 696, 702, 130 L.Ed.2d. 574, 584. We have considered the application of Tome, but find it unnecessary for us to become embroiled in the thorny question of Tome's applicability, because we hold that the admission of the diaries was harmless error in any event and, further, that the diaries would have been admissible under Federal Rule of Evidence 803(24).

A. Harmless Error

Assuming arguendo that Tome is applicable to this case and that the diaries would not be admissible under any other evidence rule, any error would be harmless in light of the remaining evidence against Mims. The remaining evidence revealed a course of conduct involving the use of city hall influence to gain Shaw a percentage of Godwin's company. Mims refused to deal with Godwin's first partners and then made every effort to insure that Shaw would profit from the building of the steam plant. Prior to the submission of the steam plant proposals, Mims sent a steam plant equipment salesman to see Shaw and also sent Shaw to Stone Container, representing that Shaw was the person handling the steam plant operation.

The error in Tome was far more harmful to the defendant than any purported error in this case. Tome was a prosecution for sexual abuse involving a child who had great difficulty testifying. See Tome, 513 U.S. ___, ___, 115 S,Ct. 696, 699-700, 130 L.Ed.2d 574, 579-80. The child's prior consistent statements were introduced by

six witnesses who bolstered the child's weak testimony. Id. Clearly, the prior consistent statements made after the child developed a motive to fabricate were not harmless. See United States v. Tome, 61 F.3d 1446, 1455 (10th Cir. 1995). However, Godwin's diaries are in no way similar to the parade of six witnesses who bolstered the child's testimony in Tome. The jury heard Godwin testify on both direct and cross-examination regarding the diaries. During direct testimony, Godwin read directly from the diaries. Consequently, admitting the diaries does not amount to bolstering weak testimony.

Mims expressed concern that the diaries were used by the government to explain the discrepancy in the date of the meeting at the Bienville Club. Despite the fact that Mims was at a different speaking engagement on February 2--the date Godwin recorded as the meeting date--there was sufficient other evidence to show that the meeting actually took place on January 30. Mims's calendar, as well as the Bienville Club records, shows that he had lunch at the club with two other people on January 30. Godwin recorded that he met County attorney Trout during this meeting, and Trout was not at the Bienville Club on February 2, but was at the club on January 30. Furthermore, the letter that Godwin testified that Mims requested was sent on February 1. There was clearly enough evidence to link Mims to this meeting without regard to the contents of the diaries. The credibility of the testimony of Godwin as opposed to Mims was a question for the jury to weigh. In addition, Mims places great emphasis on the fact that this meeting is the only direct evidence of his involvement. While this may be true, there was an abundance of circumstantial evidence

linking Mims to the extortion scheme, and circumstantial evidence is afforded the same weight as direct evidence.

Mims also expressed concern about the fact that the words "Hobbs Act" were written beside the entry for December 8 in the permanent diary. Although the jury saw this entry, that, in and of itself, is not sufficiently prejudicial to override the other evidence against Mims. During oral argument, counsel for Mims suggested that politicians and bureaucrats should tell people to "get together" for the benefit of a project. However, this "transaction" involved far more than simple encouragement of cooperation. Godwin was well-informed that doing business with Mims and city hall meant giving control of his company to Shaw. After reviewing all of the evidence against Mims, we hold that the admission of the diaries was harmless error.

B. Federal Rule of Evidence 803(24)[12]

The Supreme Court in Tome noted:

> When a party seeks to introduce out-of-court statements that contain strong circumstantial

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[12] The government also argued that the diaries were admissible under Federal Rule of Evidence 612 because Mims used them to refresh his recollection when preparing to testify. Pursuant to Rule 612, the diaries could be submitted to the jury only for the purpose of evaluating the credibility of the witness and not as substantive evidence, as was the case with the Godwin diaries.

> indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B). If its requirements are met, Rule 803(24) exists for that eventuality.

Tome, 513 U.S. ____, ____, 115 S.Ct. 696, 705, 130 L.Ed.2d 574, 588. Even assuming that Godwin's diaries were inadmissible under 801(d)(1)(B), they were admissible under the catch-all Rule 803(24).[13]

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[13] Federal Rule of Evidence 803(24) reads as follows:

> (24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless

In order to admit evidence under rule 803(24), this circuit requires the proponent to meet the five conditions of "notice, guarantees of trustworthiness, materiality, probativeness and a meeting of the interests of justice by introducing such evidence." United States v. Scrima, 819 F.2d 996, 1000 (11th Cir. 1987) (citations omitted). Generally, the 803(24) exception is not available when the declarant is available to testify due to the requirement that the statement be "more probative on the point for which it is offered than other evidence that the proponent can procure through reasonable efforts." Fed. R. Evid. 803(24). See United States v. Taylor, 792 F.2d 1019, 1027 (11th Cir. 1986), cert. denied, 481 U.S. 1030, 107 S.Ct. 1958, 95 L.Ed.2d 530 (1987). However, the situation with Godwin's diaries is unique. Godwin was available to testify, but due to the defense claim that the permanent diary was fabricated, the judge found it necessary to admit the diaries to allow the jury to compare them. In this instance, the best evidence was not Godwin's testimony but the diaries themselves.

> the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Even if notice to the defense is insufficient, "[t]his Circuit holds that a failure to comply with the notice requirement is not controlling if defendant is not harmed and 'had a fair opportunity to meet the statements.'" United States v. Parker, 749 F.2d 628, 633 (11th Cir. 1984) (citing United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976)). In the present case, the government decided to offer the diaries into evidence only after Baxley requested that they be published to the jury. The defense had ample opportunity to cross-examine Godwin about the diaries. Mims's trial counsel complained to the district court that he did not have the opportunity to cross-examine Godwin about comments regarding Mims. However, we agree with the district court's conclusion that due to the extent of the cross-examination of Godwin, their admission caused no prejudice to any of the defendants.

Moreover, the purpose of Rule 803(24) is instructive. "Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere. Yet tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules." United States v. Mathis, 559 F.2d 294, 299 (5th Cir. 1977).[14] Godwin repeatedly read from the

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[14] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

diaries during direct examination, and the defense exhaustively cross-examined him concerning their reliability. Mims's own counsel asked Godwin to use the diaries to refresh his recollection during cross-examination and, when unsuccessful, asked if Godwin might find any other notes at home regarding a certain date. R13 at 1110-11. The defense made the credibility of the diaries and Godwin central to the outcome of the case. Consequently, it would be unfair for Mims to, in effect, reap the benefits of the thorough cross-examination of Godwin concerning the diaries, but not allow the jury to explore the entire situation by seeing the diaries for themselves. Moreover, Mims used the diaries to prepare for his own testimony. Mims's counsel did not object to Baxley's extensive cross-examination of Godwin using the diaries, and even said himself that portions of them were probably admissible.

This case presents a unique situation in which the prior consistent statements are the actual diaries that were composed by the extortion victim, were used extensively throughout trial testimony, and were placed into question by the defense. The district court concluded that their admission would cause no prejudice to any of the defendants. This unusual situation in which recorded diaries were read to the jury, used by both Mims and the declarant to testify, and in which both the declarant and the diaries were thoroughly cross-examined most assuredly is the type of situation contemplated to Rule 803(24). Accordingly, we also hold that the diaries were admissible under Rule 803(24).

IV. CONCLUSION

For the foregoing reasons, we affirm Mims's convictions.

AFFIRMED.

[DO NOT PUBLISH]

RECEIVED
DEC 17 1993
U.S. DIST. JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-7436

D.C. DOCKET NO. CR89-00105-B

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 15 1993
MIGUEL J. CORTEX
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ELLIS L. McDONALD, LAMBERT C. MIMS, CHARLES S. SHAW, FRANCIS A. WILKIE, JR.,

Defendants-Appellants.

NO. 91-7145
D.C. DOCKET NO. CR89-00105-CB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES S. SHAW, FRANCIS A. WILKIE, JR., ELLIS L. McDONALD, LAMBERT C. MIMS,

Defendants-Appellants.

NO. 91-7333
D.C. DOCKET NO. CR89-00105-CB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Alabama

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(December 15, 1993)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

I.

This is a complex criminal case involving four defendants and twenty-nine issues raised on appeal. The record demonstrates that the defendants were charged with numerous criminal violations including, among other things, racketeering, extortion, conspiracy to defraud, fraud through the use of the mails, obstruction of justice and various tax charges. The case was tried to a jury in the United States District Court for the Southern District of Alabama. The trial lasted approximately two and a half months. With the exception of defendant Shaw, who was convicted on both of the charges made against him, the remaining defendants were convicted of some charges, but acquitted of others. Each defendant appeals his

conviction. Additionally, defendant McDonald appeals his sentence and the denial of his post-verdict motion.

II.

During the trial the government presented massive amounts of evidence through witnesses and documents that the defendants were involved in an extortion referred to as "The Steam Plant Extortion," fraud and bribery of the Mobile Water Service System, tax fraud, and obstruction of justice. After carefully reviewing the massive record in this case, and after reading the briefs and having the benefit of oral argument, we are persuaded that there is no merit to any of the issues the defendants present in this appeal concerning their convictions. Therefore, the convictions of each defendant are summarily affirmed.

III.

Defendant McDonald argues that, in sentencing[1] him on the four counts[2] subject to a sentencing guidelines sentence, the district court improperly added two levels to the adjusted offense level for obstruction of justice based solely on the fact that McDonald had been indicted for tampering with the jury. In its brief, the government concedes that, pursuant to previous holdings of this court, the district court is required to make findings, based upon a preponderance of the

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[1] Ellis McDonald is the only defendant to appeal his sentence.

[2] Counts One, Twenty-seven, Twenty-eight and Thirty-five.

evidence, and cannot base its findings solely on the allegations contained within an indictment. See United States v. Andrews, 953 F.d 1312 (11th Cir. 1992); United States v. Castalanos, 904 F.2d 1490, 1495 (11th Cir. 1990). Accordingly, we vacate McDonald's sentence and remand his case to the district court for resentencing on Counts One, Twenty-seven, Twenty-eight and Thirty-five.[3]

AFFIRMED in part, VACATED in part and REMANDED for resentencing.

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[3] We also observe from the record that the adjusted offense level used at sentencing was incorrectly determined, by a mistake in the addition, to be twenty-three. The base offense level was determined to be nineteen. Defendant McDonald then received a four level increase for role in the offense and a two level increase for obstruction of justice. These figures result in a total adjusted offense level of twenty-five instead of twenty-three. The district court should correct this error upon remand.

Supreme Court of the United States

No. 93-1805

LAMBERT MIMS,

Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed January 17, 1995.

The petition herein for writ of certiorari to the United States Court of Apeals for the Eleventh Circuit is granted.

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court
of the United States
By Francis J. Carson
Chief Deputy

Supreme Court of the United States

No. 93-1805

LAMBERT C. MIMS,

Petitioner

v.

UNITED STATES

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Tome v. United States*, 513 U. S. ____ (1995).

IT IS FURTHER ORDERED that the petitioner Lambert C. Mims recover from the United States Three Hundred Dollars

($300.00) for his costs herein expended.

January 17, 1995

A true copy WILLIAM K. SUTER
Test:
By Francis J. Carson
Chief Deputy

Clek's
costs:
$300.00